Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

85 - 1271

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

COVENANT COMMUNITY CHURCH,
Appellant
VS.
TOMMY LOWE, KNOX COUNTY CLERK,
Appellee

MOTION TO DISMISS APPEAL OR MOTION TO AFFIRM JUDGMENT BELOW

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

GEOFFREY P. EMERY
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Counsel for Appellee

February, 1986

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MOTION TO DISMISS APPEAL OR ALTERNATIVELY TO AFFIRM THE JUDGMENT OF THE TENNESSEE SUPREME COURT

Appellee moves this Court to dismiss the appeal herein pursuant to Rule 16 on the grounds that the appeal fails to present a substantial federal question or alternatively, that the Judgment of the Tennessee Supreme Court should be affirmed on the grounds that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

STATUTES

This appeal involves the validity of Chapter 847 of the Tennessee Public Acts of 1982 which has been challenged by the Appellant as being violative of the United States Constitution. The statute is a state law passed by the Tennessee General Assembly but one of local application affecting Knox County, Tennessee only. It has been duly ratified by the Knox County Legislative Body in accordance with Article XI, Section 9 of the Tennessee Constitution. The Act is set forth in part in the Appellant's Jurisdictional Statement, Appendix A-39 through A-65. Portions of Section 1 and Section 2 have been omitted from the statement apparently through oversite. Those Sections are appended to this Motion. See Amended Appendix A-1, A-2. In summary, the Act imposes a privilege tax on the occupancy of hotel or motel rooms in Knox County, Tennessee. The tax which is levied upon the privilege of room occupancy by a transient, as defined in the Act, amounts to 5% of the consideration charged by the hotel or motel operator. The proceeds of the tax are used to promote tourism, to fund a tourist commission, and to defray the cost of constructing, acquiring, maintaining or operating tourist related facilities. The requirement to collect and remit the tax is upon the hotel or motel operator and not upon the occupant of the room.

PROCEEDINGS BELOW

Appellant rents certain rooms at a Howard Johnson Motel in Knoxville for the purposes of holding its Sunday School and Church services. Pursuant to the tax authorized by Chapter 847 of the Public Acts of 1982, a 5% privilege tax was placed on the occupancy of each room by the operator thereof. The Appellant paid the tax under protest. Appellee complied with the request of the Appellant to seek a ruling from the Tennessee Attorney General's Office as to whether or not the tax was constitutional. The ruling of the Attorney General was in the affirmative. Thereafter, Appellant filed suit in Knox County Chancery Court seeking a refund of the taxes paid and a declaration of the invalidity of the tax on constitutional grounds involving the 1st and 14th Amendments. The Knox County Chancery Court in its Decree and Memorandum Opinion dated October 29, 1984 found that the statute did not violate Appellant's First Amendment rights regarding freedom of religion, that it did not violate the Establishment Clause of the United States Constitution and that it did not violate the Equal Protection Clause of the United States Constitution. Appellant then instituted a direct appeal to the Tennessee Supreme Court, which, in an Opinion issued October 28, 1985 reported in 698 S.W.2d 339 held that the privilege tax on the occupancy of hotel and motel rooms as authorized by the challenged statute and which was rented by the Church for religious worship and instruction did not violate the Free Exercise or Establishment Clause of the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

THE APPEAL FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

This case presents no substantial federal question that has not been previously decided by this Court. While it is clear that the Free Exercise Clause of the United States Constitution prevents government regulation of religious beliefs or interference with the dissemination

of religious ideas, Gillette v. United States, 401 US 437, 462 (1971), it cannot be asserted as authority to relieve religious groups from all the financial burdens of government. Murdock v. Commonwealth of Pennsylvania, 319 US 112 (1943)

This Court, in Murdock, noted that a tax on the spreading of religious beliefs door to door was quite different from a tax on the income of one who engages in religious activities or a "tax on property used or employed in connection with those activities". Id. The tax in the instant case is levied upon the privilege of occupancy of hotel or motel rooms which is in the nature of a property right rather than a tax on the act of worshipping or the act of preaching itself. The burden, if any is found to exist, is purely an indirect one and one which withstands constitutional scrutiny. As stated in the case of Braunfield v. Brown, 366 US 599, 606 (1961):

> To strike down without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e. legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. ...The list of legislation of this nature is nearly limitless. It cannot be expected much less required that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions.

Appellant's contention that the challenged statute violates the Establishment Clause of the First Amendment also does not present a substantial federal question. This Court has quite clearly identified the evils against which the Establishment Clause was intended to afford protection and they are (a) sponsorship (b) financial support and (c) active involvement of the sovereign in religious activity. The Court, having defined those evils, has articulated a three-prong test in determining whether the legislation violates the Establishment Clause. They are that the statute have a valid secular legislative purpose, that the act have as its principal or primary effect

one that neither advances nor prohibits religion, and that the statute does not foster an excessive entanglement with religion. Lemon v. Kurtzman, 403 US 602, 612-613 (1971); Board of Education v. Allen, 392 US 236, 243 (1968); Walz v. Tax Commission, 398 US 664, 674 (1970)

There is no question that the statute's purpose of collecting revenues to fund the promotion of tourism and/or to build tourist related facilities is a valid secular purpose. It is equally as clear that the tax has no practical effect on the Appellant's religious practices and thus is one which neither advances nor prohibits religion. Finally, the statute does not foster an excessive entanglement with religion in that the act places the obligation to remit the tax upon the operator of the hotel or motel and under no scenario would the Appellee seek to collect the tax from the church itself. Section 4(a) 1982 Tennessee Public Acts, Chapter 847.

The Tennessee Supreme Court as well as the Chancery Court of Knox County applied the test formulated by this Court for determining violations of the Establishment Clause and both Courts correctly found that the statute in question passed the test. For that reason the Judgment of the Tennessee Supreme Court should be affirmed.

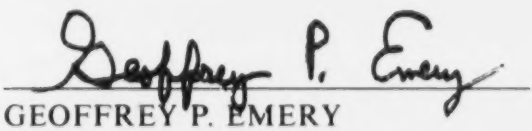
The third issue presented on appeal by the Appellant involves a challenge to the statute on equal protection grounds. This issue also presents no substantial federal question. The Tennessee Supreme Court correctly noted that the tax authorized by the statute is not imposed upon real or personal property but upon the privilege of occupying a hotel or motel room. It is correctly classified as a privilege tax and not a property tax. It applies equally and uniformly to all parties whether religious or secular who on their own volition choose to use a hotel or motel room for any purpose. Appellee takes issue with the statement that groups which "rent their places of worship are required to pay a privilege tax under 1982 Public Acts, Chapter 847". There is no tax authorized under the challenged statute on impecunious church groups which rent houses, community clubs, fraternal organization facilities, commercial facilities or

buildings of other churches because they have no house of worship. The tax is purely a privilege tax upon the occupancy of a hotel or motel room and is not a statute which discriminates against churches on a basis of property ownership.

CONCLUSION

For the aforegoing reasons, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to require further argument and Appellee respectfully moves this Court to dismiss the Appeal or in the alternative to deny plenary consideration and affirm the Judgment of the Tennessee Supreme Court.

Respectfully Submitted,



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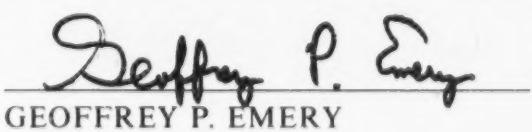
CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion to Dismiss or in the alternative Motion to Affirm Judgment have been served upon Frederic S. Le Clercq, Counsel for the Appellant by depositing same in the United States Mail, postage prepaid, this 25 day of February, 1986.



GEOFFREY P. EMERY

APPENDIX

AMENDMENT TO JURISDICTIONAL STATEMENT APPENDIX

Appellee moves to amend the Jurisdictional Statement as filed by the Appellant by showing to the Court that subsection (b) Section 2 of the 1982 Tennessee Public Acts, Chapter 847 is incorrectly referred to as Section 1(d) and further that subsections (d) through (l) of Section 1 and Section 2(a) have been omitted from the Jurisdictional Statement so that the Jurisdictional Statement Appendix A-44 should be amended to read as follows:

SECTION 1

(d) OCCUPANCY. "Occupancy" means the use or possession or the right to the use or possession of any room, lodging, accommodation or ground space in a hotel for a period of less than thirty (30) continuous days.

(e) TRANSIENT. "Transient" means any person who exercises occupancy, or is entitled to occupancy, of any rooms, lodgings, accommodations or ground space in a hotel for a period of less than thirty (30) days.

(f) CONSIDERATION. "Consideration" means the consideration charged, whether or not received, for the occupancy in a hotel valued in money whether to be received in money, goods, labor, or otherwise, including all receipts, cash, credits, property and service of any kind or nature without any deduction therefrom whatsoever. Nothing in this definition shall be construed to imply that consideration is charged when the space provided to the person is complimentary from the operator and no consideration is charged or received from any person.

(g) OPERATOR. "Operator" means the person operating the hotel whether as owner, lessee, or otherwise.

(h) TAX COLLECTION OFFICIAL. "Tax collection official" means the county clerk of the county.

(i) TOURISM. "Tourism" means the planning and conducting of programs of information and publicity designed to attract to the county tourists, visitors and other interested persons from

outside the area and also designed to encourage and coordinate the efforts of other public and private organizations or groups of citizens to publicize the facilities and attractions of the area.

(j) TOURIST RELATED FACILITY. "Tourist related facility" means any facility relating to tourism including without limitation an arena, theatre, auditorium, stadium, civic center, museum, or convention center.

(k) THE MUNICIPALITY. "The municipality" means the largest municipality by population in any county to which this act may apply.

(l) MAYOR. "Mayor" means the mayor of the largest municipality by population in any county in which this act may apply.

SECTION 2.

LEVY OF TAX. In counties having populations of not less than 300,000 nor more than 350,000, according to the Federal Census of Population of 1980, or any subsequent federal census, there is authorized a privilege tax upon the privilege of occupancy in any hotel by a transient in an amount not to exceed the rates provided hereinafter of the consideration charged by the operator. The rate of the tax in increments of one-tenth (1/10) of one percent (1%) shall be set annually by the board of county commissioners or the county legislative body. The tax is a privilege upon the transient occupying the room or ground space and shall be collected, distributed and expended as hereinafter provided. The maximum rate of such tax shall be determined as follows:

(a) Any county which shall have undertaken, or which shall have contracted for, construction or acquisition of a tourist related facility within the definition of this act is authorized to levy the tax upon the privilege of occupancy at a rate not to exceed five percent (5%) of the consideration charged by the operator.

(b) Any county which has not undertaken, or which has not contracted to undertake, construction or acquisition of a tourist related facility within the definition of this act is authorized to levy the tax upon the privilege of occupancy at a rate not to exceed three percent (3%) of the consideration charged by the operator. (referred to in Jurisdictional Statement as Section 1. (d))